UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

D & D ENTERPRISES, INC. D/B/A
BELTWAY TRANSPORTATION COMPANY

and
Case 5-CA-22170

DRIVERS, CHAUFFEURS & HELPERS LOCAL
UNION NO. 639 A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

James P. Lewis, Esq. and Elicia Lynne Marsh
for the General Counsel.
Steven C. Kahn, Esq., (Miller, Canfield, Paddock and Stone,
P.L.C.), of Washington, DC, for the
Respondent.
Hugh J. Beins, Esq., (Beins, Bidley, Axelrod
& Kraft, P.C.) of Washington, DC, for the Charging Party.

SUPPLEMENTAL DECISION

JOHN H. WEST, Administrative Law Judge: The seven-day trial in this proceeding closed on November 24, 1992 and on June 9, 1993 I issued a Decision in this proceeding. On October 31, 1995 the National Labor Relations Board (Board) issued a Decision and Order, reported at 319 NLRB 579, adopting my findings that (1) D & D Enterprises, Inc. d/b/a Beltway Transportation Company (Beltway) violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, (Act) by, inter alia, failing to reinstate economic strikers Jimmy Williams and David Johnson to their former jobs and by subsequently discharging them, and (2), in light of the involved violations of the Act, Beltway could not rely on a tainted decertification petition, and by failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of the employees in the involved unit Beltway violated section 8(a)(1) and (5) of the Act

Thereafter, the Board filed with the United States Court of Appeals for the Fourth Circuit a petition for enforcement of its order entered against Respondent.

On September 4, 1997 the court in NLRB v. D & D Enterprises, Inc., 125 F.3d 200 (4th Cir. 1997) issued its decision granting the petition for enforcement in part, vacating it in part, and remanding for further proceedings. As here pertinent, the court granted that portion of the Board's petition which determined that Beltway violated the Act when it replaced Williams and Johnson as regular run drivers after the involved strike and gave them utility driver positions. The court ordered Beltway to award Williams and Johnson backpay from August 12, 1991 until the

date of their respective terminations. The court vacated that portion of the Board's order which (1) ordered the reinstatement of Williams and Johnson, and (2) ordered Beltway to recognize and bargain with the Union due to the invalidity of the decertification petition. The court remanded the matter so the Board could resolve the evidentiary dispute between Beltway, and Williams and Johnson regarding the reason Williams and Johnson did not receive runs to drive following the August 1991 strike. And the court indicated that "[t]he Board may then consider what effect, if any, its resolution of this dispute has on the reinstatement and back pay issues for Williams and Johnson, and the validity of the decertification petition."

On December 12, 1997 the Board advised the parties that it had decided to accept the court's remand and the Board invited statements of position.

In mid-January 1998, (a) General Counsel, (b) the Drivers, Chauffeurs and Helpers Local Union No. 639 a/w International Brotherhood of Teamsters, AFL-CIO (Union) and (c) Beltway filed statements of position.

On June 10, 1999 the Board issued an Order indicating, as here pertinent, as follows:

> IT IS ORDERED that this case is remanded to Administrative Law Judge John H. West to resolve the issues raised by the court on remand.
>
> IT IS FURTHER ORDERED that the administrative law judge shall prepare and serve on the parties a supplemental decision containing findings, and recommendations, based on all the record evidence.

In note 4 of the Remand Order the Board indicated "in remanding this case to the judge, we instruct him to address whether regular drivers and utility drivers had to arrive at work at the same time and, if not, what effect this had, if any, on their failure to make a livable wage and abandonment of work."

In her Position Statement, Counsel for General Counsel contends that the record is sufficient to resolve the evidentiary dispute regarding the reason Williams and Johnson did not receive runs; that the availability of runs for utility drivers depended upon whether regular run drivers and/or charter drivers were absent and not able to perform their runs for the day; that the evidence fails to establish that the utility driver's arrival time determined whether or not work was available; that Beltway did not produce evidence legally sufficient to demonstrate that Williams and Johnson could earn a livable wage given the number of other utility drivers with whom they had to compete for work; that from August 12 to September 13, 1991 no more than three of the approximately six utility drivers could conceivably make a livable wage; that Williams' and Johnson's attempt to seek additional work was the direct result of Beltway's unlawful action of not reinstating the employees to their regular positions they held before the strike which guaranteed work and a steady livable wage; that but for Williams' and Johnson's unlawful replacement and demotion to intermittent work, questions

about their unavailability and alleged misconduct would not have arisen; that the subsequent terminations of Williams and Johnson were not causally connected to their reporting time, but rather, directly related to Beltway's initial refusal to reinstate them as regular run drivers; that Beltway did not have a time clock that recorded employees' official arrival at the plant, and therefore did not provide sufficient probative documentary evidence to (1) support its position that Williams and Johnson were unable to earn a livable wage because they frequently arrived to work late and, therefore, did not receive runs, and (2) rebut Williams' and Johnson's testimony regarding when they arrived for work as utility drivers after the strike; that there is no evidence to suggest that the employees assigned to utility drivers positions, poststrike, could earn a livable wage even if they arrived daily at 6:30 a.m. in that there were more utility drivers on hand than there were actual absences that required a substitute driver; that Beltway's own evidence demonstrates that contract runs were assigned only to at most three or four utility drivers from August 12 to September 13, 1991, and on August 12, 14, 20 and 22, 1991, Beltway had open contract runs sufficient to assign to only two utility drivers; that even if all six utility drivers arrived at 6:30 a.m., a contract run could not possibly be guaranteed to all utility driver employees; that by denying Williams and Johnson their regular runs and the weekend work they both did Beltway denied the two employees the ability to earn a livable wage; that Beltway's own exhibits demonstrate that the pay for Williams and Johnson as utility drivers was blatantly inadequate and Williams testified that as a utility driver he was "in financial trouble ... getting ready to get evicted ... [and] wasn't making enough [money] to feed [three young kids, age 9 to 3], to clothe them or to pay ... rent [and went] back to the union [to] ask for help ... to subsidize the lost days" (all bracketed words in original); that while Beltway's vice president of operations, Neal Wenger, testified that half of the time he assigned work around the office to utility drivers when runs were not available, he did not assign such work to Williams and Johnson on the days when runs were not available for them; that Williams and Johnson were constructively discharged, Pillsbury Chemical Co. v. Teamsters, 317 NLRB 261, 265-66 (1995), Association of Apartment Owners, 255 NLRB 127 (1981) and Fidelity Telephone Company, 236 NLRB 166 (1978); that but for the employees' abrupt replacement and demotion, Williams and Johnson would have earned a livable wage performing regular and guaranteed work, and would not have sought additional work to supplement a diminished income; that Williams and Johnson must be reinstated to their regular run positions or substantially equivalent positions, and with their reinstatement the 14 signatures on the decertification will be insufficient to rebut the Union's majority support; and that the petition was tainted by the coercive effect of Beltway's unfair labor practices of its refusal to reinstate Williams and Johnson and its subsequent termination of the two most visible Union supporters because the conduct was aimed at undermining employee support for the Union.

In its Position Statement the Union argues that in effect Williams and Johnson were starved out of their jobs and they had to find other employment in order to make a living; that the

court questions whether Williams and Johnson were denied a living wage and in doing so, relies upon the testimony of the discredited supervisor Wenger that they 'received runs everyday they arrived at work on time following the strike' (Sl.op.p.14); that after returning from the strike Williams reported for work every day for three or four weeks and he received about three days work a week, which was usually weekends; that Beltway dried Williams up and strangled him economically and there was no question that Beltway was bent on a constructive discharge; that Wenger told Williams that he might lose his job because of the Union; that after the strike Johnson reported for work each day until August 27, 1991 but worked only four days; that before the strike Johnson worked 60 to 70 hours a week; that by taking away Williams' and Johnson's regular runs and making them utility drivers Beltway sent a message to the other employees, namely if you support the Union you will lose your regular job; that the credibility of Wenger and the other Beltway witnesses was destroyed; that "[w]ith all due respect to the Fourth Circuit, there is no way to separate the events ... [in that] [t]hey are part and parcel of one concerted effort by ... [Beltway] to destroy the Union"; that Beltway cannot refuse to bargain with the Union based on a decertification petition where the context involves substantial unremedied employer unfair labor practices; that the test is not direct evidence of causation; that the correct test is whether the unfair labor practices had a 'reasonable tendency' to erode the Union's support, thereby precluding the Employer from relying upon any good-faith defense, Columbia Portland Cement Co., 303 NLRB 880 (1991), enf. 979 F.2d 460 (6th Cir. 1992); that this case does not require any further trial and the record is complete; that Beltway's credibility was destroyed and "should not now be revived by the Fourth Circuit or any one else"; and that this case presents classic 8(a)(1), (3) and (5) violations, the parts cannot be separated, and Beltway's conduct is part and parcel of a continuing scheme to destroy the Union.

Beltway, in its Position Statement, contends that Williams acknowledged that on only two days between August 12, 1991 when he returned to work following the end of the involved strike, and September 4, 1991, when he left Beltway to accept a job with Otis Eastern, did he fail to receive a run; that Johnson acknowledged that he frequently arrived late to work between August 12, 1991 and August 29, 1991 when he abandoned the job altogether and that on only one day did he fail to receive a run which he believed (albeit incorrectly) that he, rather then the driver regularly assigned the run, should have received; that the overwhelming weight of the evidence, including Beltway's contemporaneous, unimpeached documents, establishes that the alleged inability of Williams and Johnson to secure sufficient work at Beltway after the strike was attributable solely to their repeated tardiness; that nothing in the record suggests that Beltway's reinstatement of Williams and Johnson to the job of utility driver, rather than to their regular prestrike runs 'caused them to engage in the misconduct -- abandonment of work -- for which they were terminated.' 125 F.3d at 206; that even if the Board determines that Williams and Johnson should be reinstated, a bargaining order still is not warranted in light of (1) the absence of

evidence that the termination of Williams and Johnson prompted employees to abandon the Union and (2) uncontradicted evidence that (a) the decision of employees to sign the decertification petition was not influenced by the alleged discriminatory treatment of Williams and Johnson, (b) employees generally were unaware that Williams and Johnson were not reinstated to their prestrike runs, and (c) many employees were not even aware that Williams and Johnson and had been terminated by Beltway; that even if the Board determines that the decertification petition was not valid, and the withdrawal of recognition unlawful, issuance of a bargaining order is not warranted in view of the passage of time since commission of the alleged unfair labor practices and the substantial employee turnover; and that if the Board determines that the withdrawal of recognition was unlawful, the only appropriate remedy is an election, rather than a bargaining order.

As indicated above, neither the Counsel for General Counsel nor the Union believes that it is necessary to reopen the record herein, and the Board has already ruled on the only reason advanced by Beltway for reopening the record.

Before getting into the stated reasons why this case was remanded, certain conclusions of the court in its decision herein must be addressed. First, in note 1 at page 202 of its decision in this case the court indicates "[n]otably, both regular run and utility drivers had to report to work by 6:30 a.m." Also, the court at page 208 of its decision in this case reached the following conclusions:

> In considering the Board's argument that Beltway's misconduct caused Williams and Johnson to abandon work, we note, first that arriving at work by 6:30 a.m. is a requirement for all Beltway drivers - both regular run drivers and utility drivers. [emphasis added] The only difference between the two positions is that regular run drivers are guaranteed runs if they arrive at work on time, while utility drivers receive runs on a first come first served basis. We note, second, that Beltway's evidence shows that Williams and Johnson received runs every day they arrived at work on time following the strike. [emphasis in original] According to Beltway, all Williams and Johnson had to do in order to earn a livable wage as a utility driver was to comply with a requirement of all drivers by arriving at work on time. Thus, if Beltway's evidence is credited, their failure to earn a livable wage was attributable to their failure to arrive at work on time, not to their status as utility drivers and, consequently, not to Beltway's misconduct in reinstating them into utility driver positions. [footnote omitted] As noted earlier, however, Williams and Johnson assert that they did arrive at work on time and that they simply were not given sufficient runs to enable them to earn a livable wage.
>
> Because arriving at work on time is a requirement for all Beltway drivers, Beltway can only be said to have caused

> Williams['] and Johnson's abandonment of work if Williams and Johnson arrived at work on time and were still unable to earn a livable wage. Both the ALJ and the Board, however, declined to resolve the parties' factual dispute concerning whether Williams and Johnson arrived at work on time yet were unable to earn a livable wage or, alternatively, whether their failure to earn a livable wage was the direct result of their failure to arrive at work on time. Because resolution of the causation issue turns on the resolution of this factual dispute, we remand this issue for further proceedings consistent with this opinion.

Perhaps the court is taking the position that all drivers (both utility and regular run) have to arrive at work at 6:30 a.m. and if Williams and Johnson were unable to accomplish this as utility drivers, then they, by their own conduct, were responsible for having their right to be reinstated to regular run positions (former job or a substantially equivalent position) extinguished. With all due respect to the court involved here, the problem is that the underpinning for the court's conclusion is factually not true. The following appears in note 13 at page 15 of Beltway's Position Statement:

> Contrary to the Fourth Circuit's mistaken view (125 F.3d at 202 n.2, 208), [Actually the note in question is note 1 at 202.] regular drivers, in contrast to utility drivers, are not generally required to report to work at 6:30 a.m. (A. 381, 393). On average, regular drivers arrive at work 'between 6:45 and 7:00.' (A. 393) Indeed, Johnson himself testified that on August 12, 1991, when he returned from the strike, he reported to work 'between 7:00 and 7:15 ... [b]ecause that's my regular reporting time. My route started at 7:55.' (A. 193) He also acknowledged that the reporting time of a regular driver varied depending on the time of the run ....

Elsewhere in its decision in this case, see page 206, the court concludes as follows:

> That brings us to the next question - did the Board correctly conclude that Williams and Johnson are entitled to reinstatement? The Board concluded that even though Williams and Johnson had allegedly been terminated for a legitimate cause - abandonment of work - they were still entitled to reinstatement to their pre-strike regular run driving positions. The Board premised its decision on two alternative grounds, First, the Board concluded that Williams and Johnson were entitled to reinstatement regardless of any misconduct on their parts because Beltway never properly reinstated them to their pre-strike positions. Second, in the alternative, the Board concluded that Williams['] and Johnson's terminations were caused by their placement in utility driver positions following the strike. In this regard, the Board reasoned that because there was no guarantee of earning a 'livable wage' as a utility driver for Beltway, Williams['] and Johnson's abandonment of their jobs to drive for Otis Eastern was

essentially caused by their placement in utility driver positions following the strike.

A.

> The Board first asserts that no matter what misconduct Williams and Johnson engaged in leading to their terminations, Beltway is required to reinstate them because reinstatement is the remedy prescribed by 29 U.S.C. ... [section] 158(a)(1), (3). Put another way, the Board contends that employee misconduct can never supersede the employer's obligation to reinstate a striking employee to his still available pre-strike position once the strike ends. We conclude that the Board's contention, which creates a per se rule, is contrary to the Board's own precedent and our Circuit precedent. [emphasis in original]

The Board, in its decision herein, never explicitly indicated that it was creating a per se rule. The following appears at page 581 of its decision in this case:

> The actions of Williams and Johnson ... do not rise to the level of misconduct that must be shown before the Board will take the extreme step of denying reinstatement and backpay to discriminatees otherwise entitled to a remedy. See Geo. A. Hormel & Co., 301 NLRB 47 (1991) (employer seeking to be excused from reinstating and making whole a discriminatee because of misconduct that was not a factor in the employer's discriminatory action must prove that the misconduct was so flagrant as to render the employee unfit for further service or a threat to plant efficiency). Compare Lear-Siegler Management Service, 306 NLRB 393, 393-395 (1992) (postdischarge threat made to coemployee in order to influence his testimony in a Board proceeding sufficient to bar reinstatement). This is particularly so, as the judge noted, where the employee's misconduct is in part a response to the employer's discrimination - here, the unlawful denial of reinstatement to jobs that would have provided full-time employment. See NLRB v. M & B Headwear Co., 349 F.2d 170, 174 (4th Cir. 1965) (employee misconduct provoked by employer's unlawful conduct not a bar to reinstatement), Earle Industries, 315 NLRB 310, 315 (1994), and cases there cited.
>
> In finding that Williams' and Johnson's false testimony concerning their postreinstatement work activities did not rise to the level of an abuse of the Board's processes that might otherwise justify a denial of reinstatement and backpay ....

Can this language of the Board from its decision in this case reasonably be construed as creating a per se rule - as the court at 206 of its decision herein concludes - that "employee misconduct can never supersede the employer's obligation to reinstate a striking employee to his still available pre-strike position once the strike ends?" With all due respect to the court involved here, contrary to the court's conclusion on this

point, I do not believe that the Board's language in its decision in this case created a per se rule. As set forth above, the Board's language in its decision in this case pointed out, in accord with Board precedent, just the opposite.

The following appears at pages 207 and 208 of the court's decision herein:

> Our decision is not inconsistent with David R. Webb Co., Inc. v. NLRB, 888 F.2d 501 (7th Cir. 1989), a case heavily relied upon by the Board. In David R. Webb, the employer permanently filled several economic positions during an economic strike and, thus, the striking employees were validly placed on a preferential recall list. See id, at 502. When three complaining former employees reached the top of the list, they were placed into a lower level position than the pre-strike position any of the three had held. In addition, it was a position that none of the three had ever performed before, and a position for which none of them had ever been trained. See id. Not surprisingly, the three performed poorly in their new jobs, and they were discharged for that poor performance. See id. Moreover, they were not placed back on the recall list. See id. The Board concluded that all three were essentially 'set up' for failure and were, therefore, entitled to be placed back on the recall list (i.e., reinstated) because their employer had never discharged its obligation to properly reinstate them following the strike. See id. at 508, 510. The Seventh Circuit agreed and held that the company was required to reinstate the three employees to their pre-strike jobs or to 'substantially equivalent' positions. See id. at 510. [emphasis added]
>
> The Board reads David R. Webb as requiring reinstatement in this case even though Williams and Johnson's tardiness and abandonment of work may have been unrelated to Beltway's unfair labor practices. At least one court agrees with the Board's interpretation of David R. Webb. See NLRB v. Ryder Sys., Inc., 983 F.2d 705 (6th Cir. 1993) (holding that employee was entitled to reinstatement even though the employee was terminated for conduct unrelated to his union activities (gross insubordination) because employee was wrongfully reinstated without his seniority following his participation in a sympathy strike). We find the Board and the Sixth Circuit's reading of David R. Webb unpersuasive. First, the David R. Webb court was not confronted with the question presented here - whether an employee can be discharged when the cause of his termination is unrelated to the company's unfair labor practices. [emphasis in original] The court in David R. Webb recognized as much. See 888 F.2d at 510 ('The NLRB's order in this case, however, directs reinstatement to the employee's pre-strike positions or positions ... substantially equivalent ... [to] those positions, and these are positions for which the employees' inability to perform in the lower-level positions is not related'). Second, accepting the Board's view would run afoul of our decision in Standard Prods, [824 F.2d 291 (4th Cir. 1987)] which

> requires a showing that the termination was caused by the company's unfair labor practices. Third, our position is consistent with the balance between the rights of the employees and employers that Congress attempted to achieve in enacting the NLRA [National Labor Relations Act]. Section 158(a) provides that an employee shall not be discriminated against for engaging in union activities. On the other hand, ... [Section] 160(c) provides that an employer cannot be required to reinstate an employe who has been properly terminated for cause. The Board's proposed rule, which would require the reinstatement of an employee who engaged in misconduct unrelated to the employer's unfair labor practices, eviscerates the employer's rights recognized in ... [Section] 160(c). Our rule, however, preserves the balance contained in the NLRA by requiring that the Board demonstrate some causal nexus between the employer's unfair labor practices and the reason for the employee's termination before the Board can order the employee's reinstatement. [emphasis added]

In David R. Webb Co., Inc. v. NLRB, 888 F.2d 501 (7th Cir. 1989) cert. denied, 495 U.S. 956 (Webb) the court, at 503, indicated as follows:

> Webb filed exceptions to the ALJ's decision with the NLRB. After reviewing the ALJ's opinion, the NLRB issued an order adopting the ALJ's rulings, findings and conclusions. That order, however, clarified the ALJ's decision by emphasizing that because of the poor performance of the three employees in the dryer-feeder position [the lower level position mentioned above by the 4th Circuit in its decision herein], Webb was not required to retain them in that position; but because that position was not substantially equivalent to the employees' pre-strike positions, Webb failed to offer reinstatement sufficient to satisfy its obligations under Laidlaw. (emphasis added)

As pointed out in Webb, supra at 502

> Laidlaw Corp. v. NLRB, 414 F.2d 99 (7th Cir. 1969), cert denied, 397 U.S. 920, ... (1970), [is relied on by the Board] for the proposition that employers violate Sections 8(a)(1) and (3) of the Act by failing to reinstate striking employees to their former or substantially equivalent positions ... after the employees have unconditionally offered to return to work following an economic strike.

At 503 and 504 Webb, supra, indicates as follows:

> Section 152(3) of Title 29 states that persons considered 'employees' entitled to the protection of the Act include any individual 'whose work has ceased as a consequence of, or in connection with, any current labor dispute ... and who has not obtained any other regular and substantially equivalent employment.' [footnote omitted] Based on this provision, the Supreme Court held in NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 381... (1967), that

after a striker has made an unconditional offer to return to work, he is entitled to an offer of reinstate '[i]f and when a job for which the striker is qualified becomes available.' The [C]ourt reasoned that if 'after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and strike guaranteed by ... [Sections] 7 and 13 of the Act.' Id. at 378 ....

At 504 and 505 Webb, supra, indicates as follows:

> The Eighth and Ninth Circuits have specifically stated that employees must be reinstated to their prior or substantially equivalent positions before an employer's obligation is satisfied. NLRB v. Rockwood & Co., 834 F.2d 837, 841-42 (9th Cir. 1987) ('because the glue tank cleaning job was not substantially equivalent to [the employee's] former position, he was entitled to accept or reject it without affecting his status as an employee under section 152(3) or his right to reinstatement'); Medallion Kitchens, Inc., v. NLRB, 811 F.2d 456, 459 (8th Cir. 1987) ('[a]bsent a substantial and legitimate business justification, an employer's obligation is satisfied only upon an offer to the former striker of a substantially equivalent job'). Other Circuits have given similar broad interpretations to the reinstatement requirement. The Sixth Circuit has held that the positions of economic strikers may be filled by permanent replacements during the strike, but the strikers 'retain the right to reinstatement in their jobs as soon as those jobs become available.' Kurz-Kasch, Inc. v. NLRB, 865 F.2d 757, 759 (6th Cir. 1989). The Third Circuit has held that '[s]triking employees retain their status as employees and must be fully reinstated when a strike ends.' Hajoca Corp. v. NLRB, 872 F.2d 1169, 1177 (3d Cir. 1989)(emphasis added) (citations omitted).

At 507 Webb, supra, indicates as follows:

> Here we are not questioning whether Webb validly discharged the three employees from the dryer -feeder position for incompetent performance. Rather, we are concerned with whether the employees were fully reinstated in the first place. When the employees accepted the lesser job of dryer-feeder, Webb removed them from the recall list and the possibility of reinstatement to their former or a substantially equivalent position. We conclude under these facts that such removal from the recall list violates the Act. The employees should maintain their 'employee' status in relation to those positions, even though they were incompetent dryer-feeders.
>
> Our holding does not immunize employees from discipline who are reinstated to positions not the substantial equivalent of their pre-strike positions. The only right they maintain that is not also held by newly hired employees in the same position is the right to eventually be reinstated to their former positions or its substantial

equivalent.

At 508 Webb, supra,indicates as follows:

> Moreover, Webb's position that its recall obligation is fulfilled once a striker accepts any job for which he is qualified places economic strikers in a potentially job-fatal situation. Allowing the employer to satisfy its Laidlaw obligation by offering a striker a position which is not the one the striker is best able to perform (in contrast to his prestrike position) could allow a system which forces the striker to accept a position at which he is predestined to fail and thus lose his original Laidlaw rights in the process. This is the type of situation against which the Act was designed to protect striking employees, since returning from a strike to such a precarious situation adversely affects the employee's right to strike and organize in the first place.

At 509 Webb, supra, indicates as follows:

> In sum, since all of Webb's arguments address its reasons for terminating the employees from the dryer-feeder position, and not reasons for terminating them from the recall list and their full reinstatement rights, we do not believe it has offered a valid defense of a legitimate and substantial business justification for its actions.

And at 510 and 511 Webb, supra, indicates as follows:

> Section 160(c) goes on to state, however, that
>
> > [n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.
>
> We read this statue as prohibiting the Board from ordering employees reinstated to the positions from which they were discharged. Webb's argument that Section 160(c) bars reinstatement here is based on its mistaken assumption that the three employees had been sufficiently reinstated at the time of their discharge from the dryer-feeder position, and that they had lost their status as 'employees' under the Act. It is true that once the employees are fully reinstated to their former or substantially equivalent positions, Webb has the right to discharge them for any legal reason. See e.g., Golden State Bottling Co. v. NLRB, 414 U.S. 168, 189 n. 10 ... (1973). The NLRB's order in this case, however, directs reinstatement to the employees' pre-strike positions or the substantially equivalent of those positions, and these are positions for which the employee's inability to perform in the lower-level positions is not related. It was not the discharge from the dryer-feeder position that constituted the unfair labor practice, but rather the termination of the employees' Laidlaw rights by removing them from the recall list and refusing to reinstate them to their former or substantially equivalent positions. Had the Board ordered reinstatement to the dryer-feeder position, ... [Section] 160(c) would

> effectively prohibit such reinstatement. Because Webb did not have 'cause' to terminate the three employees from the recall list and their right to eventual reinstatement to their pre-strike position or its substantial equivalent, the Board can order reinstatement as a remedy for that violation of Section 8(a)(1) and (3). Woodlawn Hospital, 596 F. 2d [1330] at 1344 [(7th Cir. 1979)] (recognizing that where the Board properly finds a violation of the Act, it can order reinstatement under its remedial powers granted by ... [Section] 160(c), although finding no violation of the Act here.)

Going back to the above-described conclusions of the Fourth Circuit in its decision herein regarding Webb, supra, as noted above the Fourth Circuit concludes as follows:

> Our decision is not inconsistent with David R. Webb Co., Inc. v. NLRB, 888 F.2d 501 (7th Cir. 1989), a case heavily relied upon by the Board.

With all due respect to the court involved here, as can be seen above, the Fourth Circuit's decision herein is not consistent with Webb, supra.

As noted in the above-quoted portion of the Fourth Circuit's decision herein, the court concludes as follows:

> The Board concluded that all three were essentially 'set up' for failure and were, therefore, entitled to be placed back on the recall list (i.e., reinstated) because their employer had never discharged its obligation to properly reinstate them following the strike. See id. at 508, 510. The Seventh Circuit agreed .... [emphasis added]

As can be seen above, in Webb, supra, both the Board and the court therein indicated that because of the poor performance of the three employees in that case in the dryer-feeder (lower level) position, the employer there was not required to retain the employees in that position. With all due respect to the court involved here, neither the Board nor the court in Webb, supra, concluded that the three involved employees were entitled to be placed back on the recall list because they "were essentially 'set up' for failure ...."

As noted in the above-quoted portion of the Fourth Circuit's decision herein, the court concludes as follows:

> First, the David R. Webb court was not confronted with the question presented here - whether an employee can be discharged when the cause of his termination is unrelated to the company's unfair labor practices. [emphasis in original] The court in David R. Webb recognized as much.

With all due respect to the court involved here, the court in Webb, supra, was confronted with the question presented here in that the court in Webb was reviewing a Board decision which decided whether the termination of employees from a job which was

not the employees' pre-strike job or a substantially equivalent job extinguished their right to be reinstated to their pre-strike job or a substantially equivalent job.

As noted in the above-quoted portion of the Fourth Circuit's decision herein, the court concludes as follows:

> Second, accepting the Board's view would run afoul of our decision in Standard Prods, which requires a showing that the termination was caused by the company's unfair labor practices.

In Webb, supra, the employer did the same thing, namely, attempted to focus attention on the reason for terminating the employees from the job which was not the pre-strike job or a substantially equivalent job, instead of addressing the reason for refusing to give the employees their full reinstatement rights in the first place and then extinguishing those rights. There the court, as noted above, determined that since all of the employer's arguments addressed the reason for termination and not the reason for extinguishing economic strikers' recall rights, the employer had not offered a valid defense of a legitimate and substantial defense for its actions. An employer, for obvious reasons, wants to shift the spotlight from (a) the fact that it refused to give full reinstatement rights in the first place and then it unjustifiably extinguished those rights to (b) the terminations. But the reason for the termination from the non-complying job (not complying with the employer's legal obligation to give returning economic strikers their available pre-strike jobs or a substantially equivalent position) is not even relevant to the matter at hand other than to determine whether it involved conduct which would extinguish a striker's right to his or her pre-strike job or a substantially equivalent position. On its face, whether Williams or Johnson abandoned the non-complying utility jobs does not rise to such level. The Fourth Circuit in its decision herein cites its decision in Standard Products Co., Rocky Mount Div. v. NLRB, 824 F.2d 291 (4th Cir. 1987) (Standard) and indicates that decision requires the Board

> to determine whether the employer's unfair labor practices were causally related to the employee's termination or whether the employee would have been terminated even absent the union activity.

But in 1967 in Fleetwood Trailer Co., Inc., supra, at 380, the Supreme Court held that the employer's refusal to reinstate striking employees is "destructive of important employee rights," and that where an employer "has not shown 'legitimate and substantial business justifications,' the conduct constitutes an unfair labor practice without reference to [employer] intent." Standard did not involve the rights of returning economic strikers and the extinguishing of those rights by an employer. With all due respect to the court involved here, for the above-specified reasons "accepting the Board's view [in the instant case] would [not] run afoul of ... [the Fourth Circuit's] decision in Standard Prods." (emphasis added)

As noted in the above-quoted portion of the Fourth Circuit's decision herein, the court concludes as follows:

> Third, our position is consistent with the balance between the rights of the employees and employers that Congress attempted to achieve in enacting the NLRA [National Labor Relations Act]. Section 158(a) provides that an employee shall not be discriminated against for engaging in union activities. On the other hand, ... [Section] 160(c) provides that an employer cannot be required to reinstate an employe who has been properly terminated for cause. The Board's proposed rule, which would require the reinstatement of an employee who engaged in misconduct unrelated to the employer's unfair labor practices, eviscerates the employer's rights recognized in ... [Section] 160(c). [emphasis added]

Beltway is not being ordered to reinstate Williams and Johnson to the utility driver positions. Beltway is being ordered to do that which it was legally obligated to do long before any question arose about whether Williams and Johnson abandoned a non-complying job. Beltway is legally obligated to give Williams and Johnson their pre-strike jobs or substantially equivalent jobs. As pointed out by the Supreme Court in Fleetwood Trailer Co., Inc., supra, the only way Beltway can avoid this legal obligation is to show that there is a legitimate and substantial business justification for not giving these former economic strikers their pre-strike jobs if they are, as they were here, still available. To extinguish this right would require a showing that the employees engaged in a certain level of misconduct. The misconduct alleged here does not rise to the required level. For the conclusions reached above in the quote in this paragraph to be accurate, Beltway would have had to first return Williams and Johnson to their still available pre-strike jobs. Beltway did not do this. The "discharge" unfair labor practice involved here is not that Williams and Johnson were removed from the utility driver positions. The "discharge" unfair labor practice involved here is that Beltway extinguished (which is separate from the original unlawful refusal to comply with its original legal obligation to give Williams and Johnson their still available pre-strike jobs) the rights of Williams and Johnson to their available pre-strike jobs when the alleged misconduct, on its face, did not rise to the level that would warrant such action. If Beltway had given Williams and Johnson - upon their unconditional return from the economic strike - their then available regular run jobs, then Beltway would have had the right to subsequently discharge them for any legal reason. But Beltway did not comply with this legal obligation. Again, we are not dealing with a reinstatement to the utility driver position, Consequently, with all due respect to the court involved here, Section 160(c) should not even come into play in the instant case.

Up until the Fourth Circuit's decision herein, Beltway argued that it did give Williams and Johnson, upon their return from the economic strike, a position, utility driver, which was

substantially equivalent to their regular run jobs. In effect, Beltway argued that it gave Williams and Johnson a substantially equivalent position upon their return from the economic strike; that Williams and Johnson abandoned the substantially equivalent positions; and that, therefore, Williams and Johnson abandoned their right to their regular runs. If the propositions that Williams and Johnson were given substantially equivalent positions and they abandoned those positions were accurate, this would be a logical argument. The problem with the argument is that Williams and Johnson were not given substantially equivalent positions on their return from the economic strike. So even assuming for the sake of argument that Williams and Johnson abandoned their non-substantially equivalent post-strike jobs, it could not be argued logically that in doing so Williams and Johnson abandoned their right to their regular runs. The Fourth Circuit in its decision herein specifically indicates that Beltway's argument that Williams and Johnson were reinstated to 'substantially equivalent' positions once the strike ended has no merit. In other words, the court herein agrees with the Board that Williams and Johnson were not given substantially equivalent positions upon their return from the strike. Yet the court herein by its remand is requiring, in effect, that a determination be made whether Williams and Johnson abandoned the jobs which were not substantially equivalent to their pre-strike jobs. Am I being asked to conclude logically that by abandoning their poststrike jobs - assuming for the sake of argument that was the case - which are not substantially equivalent to their prestrike jobs, Williams and Johnson were abandoning the prestrike jobs which were not substantially equivalent to the poststrike jobs? With all due respect to the court involved here, if I am, the logic escapes me. Perhaps this is why in note 1 at page 202 of its decision in this case the court indicates "[n]otably, both regular run and utility drivers had to report to work by 6:30 a.m." Perhaps this is why the court at page 208 of its decision in this case reached the following conclusions:

> In considering the Board's argument that Beltway's misconduct caused Williams and Johnson to abandon work, we note, first that arriving at work by 6:30 a.m. is a requirement for all Beltway drivers - both regular run drivers and utility drivers. [emphasis added] The only difference between the two positions is that regular run drivers are guaranteed runs if they arrive at work on time, while utility drivers receive runs on a first come first served basis. We note, second, that Beltway's evidence shows that Williams and Johnson received runs every day they arrived at work on time following the strike. [emphasis in original] According to Beltway, all Williams and Johnson had to do in order to earn a livable wage as a utility driver was to comply with a requirement of all drivers by arriving at work on time. Thus, if Beltway's evidence is credited, their failure to earn a livable wage was attributable to their failure to arrive at work on time, not to their status as utility drivers and, consequently, not to Beltway's misconduct in reinstating them into utility driver positions. [footnote omitted] As noted earlier, however, Williams and Johnson assert that they did arrive at work on

> time and that they simply were not given sufficient runs to enable them to earn a livable wage.
>
> Because arriving at work on time is a requirement for all Beltway drivers, Beltway can only be said to have caused Williams[']and Johnson's abandonment of work if Williams and Johnson arrived at work on time and were still unable to earn a livable wage. Both the ALJ and the Board, however, declined to resolve the parties' factual dispute concerning whether Williams and Johnson arrived at work on time yet were unable to earn a livable wage or, alternatively, whether their failure to earn a livable wage was the direct result of their failure to arrive at work on time. Because resolution of the causation issue turns on the resolution of this factual dispute, we remand this issue for further proceedings consistent with this opinion.

Perhaps while the court herein agrees with the obvious, namely that the regular run and utility positions are not substantially equivalent, the court is taking the position that if both utility drivers and regular run drivers have to report at the same time and if Williams and Johnson were unable or unwilling to report for work at 6:30 a. m., it would logically follow that Williams and Johnson were unable or unwilling to report at the designated starting time for regular run drivers and, therefore, they abandoned their right to be reinstated to their former jobs or a substantially equivalent position. With all due respect to the court here, the problem with this approach, as noted above, is that it is based on erroneous understanding of the facts. As Beltway correctly points out in its position statement, as noted above, regular run drivers do not necessarily report at the same time as utility drivers, 6:30 a.m.

The Fourth Circuit, at 206 of its decision herein cites Wright Line,, 251 NLRB 1083 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982) for the proposition that

> an employer may properly discharge an employee when that discharge is unrelated to the employee's union affiliation or union activity, See 662 F.2d at 901. In Wright Line, the Board held that in order to establish that an employee was unjustly discharged, General Counsel must establish that protected conduct was a motivating factor in the employer's decision to discharge the employee. See id. at 901-02. Only after General Counsel had met that burden does the employer have to demonstrate that it would have taken that same action, even in the absence of the protected conduct," id. at 902.

With all due respect to the court involved here, a Wright Line inquiry is not used in reinstatement of striker cases. As noted by the Supreme Court in Fleetwood Trailer Co., Inc., supra, an employer's failure or refusal to reinstate economic strikers, because it is destructive of important employee rights, constitutes an unfair labor practice without regard to an employer's anti-union motivation. With all due respect to the

court involved here, a Wright Line inquiry is not even relevant to the matter at hand. Even assuming for the sake of argument that Beltway had cause to terminate Williams and Johnson from the non-substantially equivalent positions, Beltway - as the court points out - has not shown that it had a legitimate and substantial business justification for its refusal to give Williams and Johnson their still available regular run jobs upon their unconditional return from the economic strike. As noted above, Beltway is not being ordered to reinstate Williams and Johnson to the utility driver positions from which they were terminated. Indeed, the relief granted regarding the terminations goes only to the unlawful termination or the extinguishing of the reinstatement rights to the regular run positions. And, as noted above, the misconduct alleged by Beltway, even assuming for the sake of argument it is true, on its face does not rise to the level which would warrant the extinguishing of the reinstatement rights of Williams and Johnson to their regular run jobs.

While I do not believe that a Wright Line inquiry is relevant, it appears that such inquiry is expected by the remand. Accordingly, it is noted that Williams and Johnson engaged in union activity; that Beltway knew of the union activity of Williams and Johnson; and that Beltway has demonstrated anti-union animus. Beltway unlawfully refused to reinstate Williams and Johnson to their still available regular runs when they returned from the strike and Beltway continued in its refusal at the time of the discharges which occurred about 8 weeks after its initial refusal. Counsel for General Counsel has made a prima facie case that the union activity of Williams and Johnson was a motivating factor in Beltway's decision to discharge them. In other words, the burden of going forward has shifted to Beltway to demonstrate that it would have taken the same action, even in the absence of the protected conduct. To meet its burden of going forward Beltway relies on the testimony of its vice president of operations, Neal Wenger, and on documents which he authored.

Wenger intentionally lied under oath about a material fact when he testified before me that on the morning of August 9, 1991 four non-striking utility drivers, Jessie Benton, Kenneth Hall, Danny Jenkins and Jesse Newman, were individually told, before they went out on runs, that they would be offered permanent runs left open by strikers, he was going to give them a list of these runs, and they would be able to bid on them according to seniority.

Wenger intentionally lied under oath about a material fact when he testified before me that Jessie Benton signed General Counsel's Exhibit 9, a bid sheet, on the evening of August 9, 1991.

Wenger intentionally lied under oath about a material fact when he testified before me that Kenneth Hall signed General Counsel's Exhibit 10, a bid sheet, about 6 p.m. on August 9, 1991.

Wenger intentionally lied under oath about a material fact when he testified before me that Danny Jenkins signed General Counsel's Exhibit 11, a bid sheet, on August 9, 1991.

Wenger intentionally lied under oath when he testified before me about when General Counsel's Exhibit 12, a bid sheet, was signed.

And Wenger intentionally lied under oath about a material fact when he testified before me that he did not play a role in which routes were designated on General Counsel's Exhibits 9, 10, 11, and 12, especially General Counsel's Exhibits 10 and 11, which were formerly Johnson's and William's routes, respectively.

The above recitation of Wenger's lies under oath is not meant to be all inclusive. I did not find Wenger to be a credible witness and I would not credit his testimony or anything he authored unless it was corroborated by a reliable source. Beltway has not met its burden of showing that it would have taken the same action against Williams and Johnson even in the absence of the protected conduct. I am not asked to rely on some objective standard like a time clock card. Rather, Beltway, in attempting to meet its burden, relies on a subjective standard, Wenger. Again, Beltway did not meet its burden. Since this matter is being resolved on the basis of Respondent not meeting its burden, there is no need to resolve whether Wenger, on the one hand, or , on the other hand, Williams and/or Johnson is telling the truth regarding this immaterial matter. However, if it was deemed necessary to resolve who is telling the truth, it is noted that on the one hand I have a witness who intentionally lied under oath about material facts versus a witness or witnesses who lied under oath about an immaterial fact. Obviously if I had to choose which to believe on that basis alone, I would choose the witness or witnesses who lied about an immaterial fact over the witness who lied about a material fact. If it is argued that the court's ruling makes material what I, the Board and other Unites States Circuit Courts of Appeals believe is immaterial, then my position would be that since some believe the involved subject of the testimony of Williams and Johnson is immaterial, I would still choose against the testimony of someone who lied under oath about matters which all involved here believe are material. But again, the termination from the utility job in terms of reinstatement to that job is not relevant to the matter at hand and Beltway has not and will not be ordered to reinstate Williams and Johnson to the utility job. As noted above, the only relevant aspects of the September 1991 terminations of Williams and Johnson by Beltway is the extinguishing of the reinstatement rights to the prestrike or a substantially equivalent position and the question of whether the alleged misconduct, even if it was true, would warrant extinguishing the reinstatement rights of Williams and Johnson to their prestrike jobs or substantially equivalent positions. Beltway has not shown that it had a legitimate and substantial business justification for its refusal to give Williams and Johnson their still available prestrike regular run jobs upon their unconditional return to work. Beltway has not shown that the alleged misconduct of Williams and Johnson while they worked

in the non-substantially equivalent job, even assuming for the sake of argument it is true, rose to the level required to extinguish their right to be reinstated to their prestrike jobs or substantially equivalent jobs.

Next, the court involved herein indicates that it must be resolved whether Beltway's unfair labor practices tainted the decertification petition to such a degree that the petition cannot be relied upon to show the Union lacks the support of the majority of Beltway's eligible employees. As acknowledged by the court at 203 of its decision herein

> [w]hen Williams [and] Johnson ... reported to work expecting to resume driving the regular runs they held immediately prior to the strike, they were told by Beltway officials that they had been 'replaced' because of their participation in the strike, but that they could remain employed as utility drivers. By letter dated August 12 [1991], Beltway informed its employees that some of the former strikers would not return to their pre-strike positions and had been re-assigned because they had been permanently replaced by other employees.

At 202 of its decision herein the court makes the following fact finding:

> Despite the fact that Beltway knew the strike was already over, on Saturday, August 10 Wenger offered Williams['], Johnson['s] and Randall's runs to drivers Kenneth Hall, Danny Jenkins and Jessie Benton. Hall requested that he not be placed on any route that had been Williams['] Johnson['s] or Randall's immediately prior to the strike. However, Wenger told Hall that, beginning on Monday, August 12, he wanted Hall to drive ... [what was] Johnson's route before the strike. Hall protested ... but Wenger and Beltway's President, Jay Davis, assigned the route to Hall despite his protestations. On that same day, Beltway gave the routes Williams and Randall had been driving immediately prior to the strike to Danny Jenkins and Jessie Benton, respectively.

As I indicated in my prior decision herein, while the aforementioned August 12, 1991 Company letter to employees, as here pertinent, did not specifically name Williams and Johnson, in a unit this small undoubtedly many in the unit knew who was involved. At one point Wenger testified that he suspected that it was common knowledge among the employees that Williams and Johnson were replaced. Certain of the employees who testified in this proceeding testified that when they signed the petition they were aware that Williams and Johnson were not reinstated to their pre-strike jobs, and some of these employees testified that they were aware that Williams and Johnson had been terminated. Only nine of the petition signers professed complete ignorance of these matters. With Williams and Johnson added back into the unit, this would mean that less than one third of the employees in the unit, notwithstanding Beltway's August 12, 1991 above-described letter to them and Wenger's testimony regarding what

was common knowledge among the employees about Williams and Johnson being replaced, claim complete ignorance of the fact that Union leaders Williams and Johnson were unlawfully denied reinstatement to their still available prestrike jobs upon their unconditional return from the strike and then terminated. Beltway argued that most of the petition signers (not the total number of employees in the unit) were unaware of the unlawful conduct when they signed the petition, and the court at 209 of its decision herein finds that "testimony suggest[s] that many of the petition's signatories were unaware of Beltway's misconduct ...." (emphasis added) The court concluded at 209 that this fact, in addition to the "absence of any evidence suggesting a connection between employee disaffection from the Union and Beltway's misconduct" with, as here pertinent, Williams and Johnson, should have moved the Board, at a minimum, to apply its own multi-factored analysis in assessing the validity of Beltway's good-faith defense to its withdrawal of recognition of the Union, rather than dismissing Beltway's defense out of hand. Again, even if one were of a mind to credit all nine of the petition signers who professed ignorance, in the situation at hand, this, either considered alone or in conjunction with the alleged absence of any evidence suggesting a connection between the employee disaffection from the Union and Beltway's misconduct with regard to Williams and Johnson, does not warrant changing the prior conclusions reached by the Board herein.

At 210, n.6 of its decision herein the court indicates as follows:

> Notably, if the Board determines on remand that Williams and Johnson should be reinstated, the very fact of their unjust termination might render the decertification petition invalid even without the change in the number of eligible employees. In that case, there was an ongoing unfair labor practice when the decertification petition was signed in late November 1991 (i.e. Williams and Johnson had been unjustly terminated and their reinstatement was required). An ongoing unfair labor practice of that magnitude could cast sufficient doubt on [the] decertification petition so as to make it invalid. See NLRB v. Williams Enter[prise]s, Inc., 50 F.3d 1280, 1288 (4th Cir. 1995) (company may not avoid duty to bargain with union unless it can demonstrate that its unfair labor practices did not cause the union's loss of support); Columbia Portland Cement Co. v. NLRB, 979 F.2d 460, 462-65 (6th Cir. 1992) (employer's failure to reinstate has long lasting effect on validity of decertification petition).

There were ongoing unfair labor practices at the time of the petition, namely, Beltway's refusal to reinstate Williams and Johnson to their pre-strike jobs or substantially equivalent positions without a legitimate and substantial business justification, and Beltway's extinguishing of Williams' and Johnson's right to be reinstated to their pre-strike jobs when Williams and Johnson had not engaged in the kind of misconduct which would warrant such action.

Unremedied unfair labor practices of the extent and seriousness involved here are likely to have undermined the Union's authority generally and influenced the employees to reject the Union as their bargaining representative. Unlike Master Slack Corp., 271 NLRB 78, (1984), which the court cites at 209 of its decision herein, the unfair labor practices here did not occur 8 or 9 years before the decertification petition. Rather, here the unremedied unfair labor practices commenced on August 12, 1991 with Beltway's unlawful refusal to reinstate the strike leaders to their former jobs which were still available when they unconditionally offered to return to work. The unremedied unfair labor practices continued with Beltway's unlawful termination of the reinstatement rights of Johnson and Williams on September 9 and 16, 1991, respectively. The signatures on the decertification petition are dated November 25, 26 or 27, 1991. In other words, the employees began signing the petition received herein a little over 5 weeks from the last of the above-described unfair labor practices and 15 weeks from the first of the above-described unfair labor practices. Unlike Master Slack Corp., supra, Beltway has not offered reinstatement to Williams and Johnson. Unlike Master Slack Corp., supra, the petition here was tainted by the involved unremedied unfair labor practices. In Master Slack, Corp., supra, the employer posted a notice to the employees agreeing to take the action ordered by the Board. Here there was no such order at the time of the decertification petition. But Beltway did nothing before the decertification petition to rescind its August 12, 1991 letter to employees, which letter indicates "[s]ome employees on strike will not be able to return to their former jobs because permanent strike replacements have been hired or other employees have been permanently moved into their positions."

As pointed out in Olson Bodies, Inc., 206 NLRB 779 (1973), which the court cites at 209 of its decision herein,

> The serious character and lasting impact on employees of such unfair labor practices cannot in our view, be too strongly emphasized. Discriminatory discharges of employees because of their union activities strike at the very heart of the Act. Their lasting impact, including the likelihood of their causing employees to defect from unions and their tendency to undermine a union's majority status by discouraging union membership and deterring organizational activity, is well settled.

The matter at issue here involves an unlawful refusal to reinstate employees to their prestrike jobs or substantially equivalent positions without a legitimate and substantial business justification, and the extinguishing of the employees' right to be reinstated to their prestrike jobs when it has not been shown that the employees engaged in the kind of misconduct which would warrant such action. As pointed out in a case cited by the court here, Columbia Portland Cement Co. v. NLRB, supra, direct evidence of causation is not required; it need only be demonstrated that the company's unfair labor practices had a reasonable tendency to erode the Union's support thereby precluding the company from relying on the good faith defense.

And as pointed out in Olson Bodies, Inc., supra, at 780,

> Serious unremedied unfair labor practices...tend to produce disaffections from a union and thus remove as a lawful basis for an employer's withdrawal of recognition the existence of a decertification petition....

The Board concluded in Fabric Warehouse, 294 NLRB 189, 192 (1989) as follows:

> It is well established that, where an employer has engaged in unlawful conduct tending to undercut its employees' support for their bargaining representative, the employer cannot rely on any resulting expression of disaffection by its employees because its asserted doubt of the union's majority has been raised in the context of its own unfair labor practices directed at causing such employee disaffection. Hearst Corp., 281 NLRB 764 (1986), aff'd mem. 837 F. 2d 1088 (5th Cir. 1988). Further, such misconduct will bar any reliance on a tainted decertification petition even though a majority of the petition signers profess ignorance of their employer's misconduct. Id. at 765.

In 1990 the United States Court of Appeals for the Fourth Circuit affirmed, without a published opinion, this Board decision. Hancock Fabrics v. NLRB, 902 F. 2d 28 (4th Cir.1990). The quote in this paragraph was quoted in my prior decision herein. And the court cites this case in its decision herein. For an employer to claim good faith doubt as to a union's majority status it must first refrain from committing serious unfair labor practices of the type committed here.

Accordingly, I find that Beltway violated Section 8(a)(1) and (3) of the Act by unlawfully failing and refusing to reinstate, as here pertinent, Jimmy Williams and David Johnson on August 12, 1991 to their former positions of employment and by unlawfully discharging Johnson and Williams on September 9 and 16, 1991, respectively; and that Beltway violated Section 8(a)(1) and (5) of the Act by withdrawing its recognition of the Union on April 1, 1992 and by refusing since then to recognize and bargain with the Union as the exclusive collective-bargaining representative of the involved unit of employees.

ORDER ON REMAND

IT IS ORDERED that the findings of fact, conclusions of law and Order set forth in my prior Decision and Order herein be, and they are hereby, affirmed with respect to Respondent D & D Enterprises, Inc. d/b/a Beltway Transportation Company (A) unlawfully failing and refusing to reinstate, as here pertinent, Jimmy Williams and David Johnson on August 12, 1991 to their former positions of employment and by unlawfully discharging Johnson and Williams on September 9 and 16, 1991, respectively in violation of Section 8(a)(1) and (3) of the Act; and (B) withdrawing its recognition of the Union on April 1, 1992 and by refusing since then to recognize and bargain with the Union as the exclusive collective-bargaining representative of the

involved unit of employees thereby violating Section 8(a)(1) and (5) of the Act.

Dated, Washington, D.C. August 20, 1999.

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John H. West

Administrative Law Judge